74 Am. Jur. 2d Treaties Summary

American Jurisprudence, Second Edition | May 2021 Update

Treaties
Romualdo P. Eclavea, J.D.

Correlation Table

Summary

Scope:
This article includes a discussion of the relation of treaties to statutes, the proper subject matter of treaties, and rules relating to the interpretation of treaties.

Federal Aspects:
Treaties are naturally within the power of the federal government, as provided by Article II, Section 2 of the Constitution, and as such, the topic is inherently federal in nature. However, individual treaties are not discussed in this article as the article is devoted to general matters relating to treaties.

Treated Elsewhere:
Alliances, war, and peace, see Am. Jur. 2d, War §§ 1 et seq.

Commercial intercourse with other nations, see Am. Jur. 2d, Customs Duties and Import Regulations §§ 12 to 22

Consuls and diplomatic agents, privileges and immunities of, see Am. Jur. 2d, Ambassadors and Consuls §§ 8 to 16

Extradition of criminals: International extradition, see Am. Jur. 2d, Extradition §§ 12 to 20

Foreign citizens, rights of, see Am. Jur. 2d, Aliens and Citizens §§ 1 et seq.

Immigration, see Am. Jur. 2d, Aliens and Citizens §§ 1 et seq.

Indian treaties, see Am. Jur. 2d, Indians; Native Americans §§ 54 to 56

Judicial notice of treaties, see Am. Jur. 2d, Evidence § 126

National boundaries, see Am. Jur. 2d, International Law §§ 30 to 33

Patent Cooperation Treaty, see Am. Jur. 2d, Patents § 733

Warsaw Convention, see Am. Jur. 2d, Aviation §§ 148 to 157

Research References:

Westlaw Databases

American Law Reports (ALR)
West's A.L.R. Digest (ALRDIGEST)
American Jurisprudence 2d (AMJUR)
American Jurisprudence Proof of Facts (AMJUR-POF)
American Jurisprudence Pleading and Practice Forms Annotated (AMJUR-PP)
United States Code Annotated (USCA)

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74 Am. Jur. 2d Treaties I Refs.

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I. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Treaties 1 to 7, 9, 10, 12

A.L.R. Library

A.L.R. Index, Treaties
West's A.L.R. Digest, Treaties 1 to 7, 9, 10, 12

Trial Strategy

Proof of a Claim Involving Stolen Art or Antiquities, 77 Am. Jur. Proof of Facts 3d 259

Forms

Am. Jur. Pleading and Practice Forms, Treaties § 6

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I. In General

§ 1. Generally; definitions and distinctions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 1

A.L.R. Library

What actions arise under the laws and treaties of the United States so as to vest jurisdiction of Federal courts, 14 A.L.R.2d 992

What actions arise under Constitution, laws, and treaties of United States; general principles, 12 A.L.R.2d 5

Recoverability of Reparations from Corporations for Nazi-Related Conduct, 6 A.L.R. Fed. 2d 279

Trial Strategy

Proof of a Claim Involving Stolen Art or Antiquities, 77 Am. Jur. Proof of Facts 3d 259

Forms

Am. Jur. Pleading and Practice Forms, Treaties § 6 (Complaint, petition, or declaration—Allegation—Claims arising under treaty)

A treaty is primarily a compact between independent nations that ordinarily depends for the enforcement of its provisions on the interest and honor of the governments that are parties to it.[1] A treaty is an agreement between nations forged in the diplomatic realm and similarly reliant on diplomacy or coercion for its enforcement.[2] It is primarily an agreement or contract between two or more nations or sovereigns[3] with a view to public welfare.[4] A treaty ratified by the United States is not only the law of the land but also an agreement among sovereign powers.[5] Even after a treaty is implemented by Congress, it remains an international agreement or contract negotiated by the executive branch and ratified by the Senate, not by Congress.[6]

The so-called "law-making treaties" are treaties that codify existing norms of customary international law or crystallize an emerging rule of customary international law.[7]

Treaties, entered into by the President with the consent of a supermajority of the United States Senate, are incorporated into the domestic law of the United States pursuant to the Supremacy Clause of the United States Constitution.[8] Under the Supremacy Clause, the provisions of a treaty that confers rights that are judicially enforceable are placed in the same category as other laws of Congress and, therefore, are subject to such acts as Congress may pass for its enforcement, modification, or repeal.[9]

Observation:

The courts look principally to two factors in determining whether a particular international agreement constitutes binding treaty law in the United States: (1) whether the United States has consented to be bound by that agreement, and (2) whether that agreement, by its terms, has entered into force as of the date in question.[10] In all cases, the courts will look to see whether a treaty ratified by the President of the United States has entered into force in order to determine whether that treaty is binding on the United States and, by its terms or pursuant to action of the Senate and the President, is enforceable in United States courts.[11] In addition to consent to be bound, a treaty must have entered into force in order to constitute law that binds a ratifying state in its relations with other states.[12]

While in force, treaties are declared by the United States Constitution to be the supreme law of the land.[13] A treaty is a law of the land as an act of Congress is whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined;[14] and when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for a rule of decision for the case before it as it would refer to a statute.[15]

A citizen of a state who is prosecuted under a state statute in a state court is in no position to invoke the treaty rights of foreign countries or of their nationals.[16] With the exception of its general humanitarian intent, a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it.[17]

CUMULATIVE SUPPLEMENT

Cases:

A treaty is essentially a contract between two sovereign nations. Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

A treaty is in its nature a contract between nations, not a legislative act. Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014).

As general matter, treaty is contract, though it is between nations. BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014).

Agreement between governments of California, Quebec, and Ontario on harmonization and integration of cap-and-trade programs for reducing greenhouse gas emissions was not treaty within meaning of Article I of Constitution, since agreement did not create alliance for purposes of peace and war, mutual government, or cession of sovereignty, and significant monetary benefits reaped by California and Quebec from their limited commercial privileges with one another was not general commercial privilege prohibited by Treaty Clause. U.S. Const. art. 1, § 10, cl. 1; Cal. Gov't Code §§ 12894(a)(2), 12894.5; Cal. Health & Safety Code §§ 38501(a), 38561(a), 38564; 17 CCR § 95943(a)(2). United States v. California, 444 F. Supp. 3d 1181 (E.D. Cal. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

2 Mora v. New York, 524 F.3d 183 (2d Cir. 2008).

3 New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 954 F.2d 847 (2d Cir. 1992); Pocatello v. State, 145 Idaho 497, 180 P.3d 1048 (2008); Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

4 Mangattu v. M/V Ibn Hayyan, 35 F.3d 205 (5th Cir. 1994).

5 Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217, 116 S. Ct. 629, 133 L. Ed. 2d 596 (1996); Dreyfus v. Von Finck, 534 F.2d 24, 34 A.L.R. Fed. 377 (2d Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

6 Safety Nat. Cas. Corp. v. Certain Underwriters At Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), cert. denied, 131 S. Ct. 65, 178 L. Ed. 2d 22 (2010).

7 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), petition for cert. filed, 79 U.S.L.W. 3728, 80 U.S.L.W. 3019 (U.S. June 6, 2011).

8 Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

9 Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

10 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

11 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

12 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

13 Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

14 Flores-Nova v. Attorney General of the U.S., 2011 WL 2989709 (3d Cir. 2011) (also stating that unratified treaties are not binding on the United States and do not have the force of law).

15 Mora v. New York, 524 F.3d 183 (2d Cir. 2008); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920); Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

16 Skiriotes v. State of Florida, 313 U.S. 69, 61 S. Ct. 924, 85 L. Ed. 1193 (1941).

17 Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993).

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74 Am. Jur. 2d Treaties § 2

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Treaties

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I. In General

§ 2. Executory and self-executing treaties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 12

A.L.R. Library

Validity, Construction, and Application of Mutual Legal Assistance Treaties (MLATs), 79 A.L.R. Fed. 2d 375

Law Reviews and Other Periodicals

Joshua, Camesasca, Jung, Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach, 75 Antitrust L.J. 353 (2008)

Treaties may be classified as executory and self-executing. An executory treaty, that is, a treaty that is not self-executing, has no direct effect until implemented by domestic law.[1] A "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law.[2] "Non-self-executing treaties" require implementing action by the political branches of government or are otherwise unsuitable for judicial application.[3]

A self-executing treaty is one that operates of itself without the aid of legislation[4] and according to its terms takes effect upon ratification.[5]

Observation:

At least four factors are to be considered when determining whether a treaty is self-executing: (1) the purposes of the treaty and the objectives of its creators; (2) the existence of domestic procedures and institutions appropriate for direct implementation; (3) the availability and feasibility of alternative enforcement methods; and (4) the immediate and long-range social consequences of self or nonself-execution.[6]

If the treaty provisions are self-executing, it is not necessary to plead the treaty's existence.[7] It is the equivalent of an act of Congress,[8] and insofar as it affects individual rights, it is a part of the municipal law of the country.[9] However, it is up to Congress whether to implement obligations undertaken under a treaty that does not itself have the force and effect of domestic law.[10] While a treaty may constitute an international commitment, it is not a binding domestic law unless Congress has enacted implementing statutes, or the treaty itself conveys an intention that it be self-executing and is ratified on that basis.[11] The President of the United States has an array of political and diplomatic means available to enforce international obligations but unilaterally converting a nonself-executing treaty into a self-executing one is not among them; the responsibility for transforming an international obligation arising from a nonself-executing treaty into domestic law falls to Congress.[12]

Observation:

In determining whether a treaty is self-executing, the courts must first look to the intent of the signatory parties as manifested by the language of the treaty, and if the parties' intent is unclear from the language of the treaty, then the court must look to the circumstances surrounding its execution.[13] Also, in determining whether a treaty is self-executing, the court looks to the text, the negotiation and drafting history, and postratification understanding of the signatory nations.[14]

CUMULATIVE SUPPLEMENT

Cases:

Although the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction is a binding international agreement, it is not self-executing; that is, the Convention creates obligations only for State Parties and does not by itself give rise to domestically enforceable federal law absent implementing legislation passed

by Congress. Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, 1997, Convention Preamble, 1974 U.N.T.S. 318. Bond v. U.S., 134 S. Ct. 2077 (2014).

[END OF SUPPLEMENT]

Footnotes

1 Mora v. New York, 524 F.3d 183 (2d Cir. 2008); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135 (2d Cir. 2007), certified question accepted, 8 N.Y.3d 994, 838 N.Y.S.2d 833, 870 N.E.2d 151 (2007) and certified question answered, 9 N.Y.3d 467, 850 N.Y.S.2d 366, 880 N.E.2d 852 (2007); Renkel v. U.S., 456 F.3d 640, 65 Fed. R. Serv. 3d 1129, 2006 FED App. 0274P (6th Cir. 2006); In re Rath, 402 F.3d 1207 (Fed. Cir. 2005).

2 Khan v. Holder, 584 F.3d 773 (9th Cir. 2009) (United Nations protocol relating to status of refugees is not self-executing).

3 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

4 Bacardi Corporation of America v. Domenech, 311 U.S. 150, 61 S. Ct. 219, 85 L. Ed. 98 (1940); Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109 (11th Cir. 1991).

5 Brzak v. United Nations, 597 F.3d 107 (2d Cir. 2010), cert. denied, 131 S. Ct. 151, 178 L. Ed. 2d 243 (2010); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135 (2d Cir. 2007), certified question accepted, 8 N.Y.3d 994, 838 N.Y.S.2d 833, 870 N.E.2d 151 (2007) and certified question answered, 9 N.Y.3d 467, 850 N.Y.S.2d 366, 880 N.E.2d 852 (2007); Khan v. Holder, 584 F.3d 773 (9th Cir. 2009); Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009), cert. denied, 130 S. Ct. 1002, 175 L. Ed. 2d 1098 (2010) (also stating that it is within Congress' power to change domestic law even if the law originally arose from a self-executing international treaty).

6 Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 41 U.C.C. Rep. Serv. 1178 (9th Cir. 1985); Air Transport Ass'n of America v. City of Los Angeles, 844 F. Supp. 550 (C.D. Cal. 1994).

7 Butschkowski v. Brecks, 94 Neb. 532, 143 N.W. 923 (1913).

8 § 12.

9 § 3.

10 Medellin v. Texas, 554 U.S. 759, 129 S. Ct. 360, 171 L. Ed. 2d 833 (2008).

11 Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

12 Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

13 Sharifi v. State, 993 So. 2d 907 (Ala. Crim. App. 2008); In re Hegney, 138 Wash. App. 511, 158 P.3d 1193 (Div. 2 2007).

14 Brzak v. United Nations, 597 F.3d 107 (2d Cir. 2010), cert. denied, 131 S. Ct. 151, 178 L. Ed. 2d 243 (2010).

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I. In General

§ 3. Treaty as municipal law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 1

A self-executing treaty entered into by the United States in accordance with constitutional requirements that does not require legislation to carry the treaty provisions into effect[1] is a municipal law, as well as an international contract.[2] The effect of the provision of the Supremacy Clause of the Federal Constitution[3] is to incorporate into the municipal law of the United States, and of each and every state, treaties entered into by the federal government within the constitutional limits of the treaty-making power insofar as they affect individual rights.[4]

Footnotes

1 § 2.

2 Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907).

3 § 12.

4 Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1936); Asakura v. City of Seattle, 265 U.S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924), opinion amended, 44 S. Ct. 634 (1924).

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I. In General

§ 4. Federal treaty-making power

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 2, 4

The Constitution of the United States specifically provides for the making of treaties by the federal government,[1] by stating that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."[2] Treaties enacted pursuant to the Treaty Clause receive a presumption of constitutionality.[3] The United States under the Treaty Clause may enter into a treaty with a nonsovereign.[4] Treaties made pursuant to this treaty power can authorize Congress to deal with matters with which otherwise Congress could not deal.[5] The treaty-making power of the federal government is independent of and superior to the legislative power of the states.[6]

A "treaty" that requires only the consent of the President of the United States is not a treaty for purposes of Article II of the Federal Constitution.[7] The United Nations Charter is, as far as the United States is concerned, an exercise of the treaty-making power under the Federal Constitution.[8]

It is uniformly conceded that a treaty cannot be considered as the law of the land within the meaning of the Federal Constitution, and as such binding on the courts, if in making it, the limits of the treaty-making power have been exceeded.[9] While there is no such limitation as to subject matter on the treaty-making power as exists in the case of the legislative power, nevertheless, the federal power to enter into treaties does not extend to the making of treaties that change the Constitution[10] or that are inconsistent with our form of government, with the relations of the states and the United States, or with the Federal Constitution, nor does it extend so far as to authorize a cession of any portion of the territory of one of the states without its consent.[11]

The Constitution prohibits the several states from entering into any treaty, alliance, or confederation and, without the consent of Congress, from entering into any agreement with another state or with a foreign power in order to prevent any union of two or more states having a tendency to break up or weaken the league between the whole.[12]

Footnotes

1 State of Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A.L.R. 984 (1920).

2 U.S. Const. Art. II, § 2.

3 Wang v. Masaitis, 416 F.3d 992 (9th Cir. 2005).

4 Wang v. Masaitis, 416 F.3d 992 (9th Cir. 2005).

5 U.S. v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).

6 State v. Roblero, 133 Ohio Misc. 2d 7, 2005-Ohio-4805, 835 N.E.2d 792 (Mun. Ct. 2005).

7 Weinberger v. Rossi, 456 U.S. 25, 102 S. Ct. 1510, 71 L. Ed. 2d 715 (1982).

8 Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

9 Asakura v. City of Seattle, 265 U.S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924), opinion amended, 44 S. Ct. 634 (1924).

10 Seery v. U.S., 130 Ct. Cl. 481, 127 F. Supp. 601 (1955) (holding that whatever may be the true doctrine as to formally ratified treaties that conflict with the Constitution, an executive agreement cannot impair constitutional rights); Pagano v. Cerri, 93 Ohio St. 345, 112 N.E. 1037 (1916).

11 In re Heikich Terui, 187 Cal. 20, 200 P. 954, 17 A.L.R. 630 (1921).

12 U.S. Const. Art. I, § 10.
As to compacts between the states, generally, Am. Jur. 2d, States, Territories, and Dependencies § 10.

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§ 5. Subject matter of treaties

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West's Key Number Digest

West's Key Number Digest, Treaties 7

Since the treaty-making power is given in general terms, without any description of the objects intended to be embraced within its scope,[1] it must be assumed that the framers of the Constitution intended that it should extend to all those objects that in the intercourse of nations have usually been regarded as the proper subjects of negotiation and treaty.[2] Accordingly, the treaty-making power extends to all subjects within the international domain and to all subjects of international concern and negotiation[3] but is limited, nevertheless, to subjects and treaties not inconsistent with our form of government, with the relations of the states and the United States, or with the Federal Constitution.[4] However, with these exceptions, it is not perceived that there is any limit to the questions that can be adjusted touching any matter that is properly the subject of negotiation with a foreign country, and thus, what the United States government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations.[5]

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution while treaties are declared to be so when made under the authority of the United States.[6] The treaty-making power is not subject to the limitations imposed by the Constitution on the power of Congress to enact legislation, and treaties may accordingly be made which affect rights exclusively under the control of the states.[7] Thus, the power extends to providing that the subjects of the other contracting party will not be subject to other or different taxation than are the subjects of the state where they are domiciled.[8]

Treaties may also relate to the rights, powers, duties, and jurisdiction of consular officers and agents.[9]

The disposition of the property of aliens dying within the territories of the respective treaty parties is also within the scope of the treaty power of the United States.[10]

Footnotes

1 § 4.

2 U.S. v. Rockefeller, 260 F. 346 (D. Mont. 1919).

3 U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942); Asakura v. City of Seattle, 265 U.S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924), opinion amended, 44 S. Ct. 634 (1924).

4 § 4.

5 U.S. v. State of Cal., 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947), opinion supplemented, 332 U.S. 804, 68 S. Ct. 20, 92 L. Ed. 382 (1947).

6 State of Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A.L.R. 984 (1920).

7 Asakura v. City of Seattle, 265 U.S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924), opinion amended, 44 S. Ct. 634 (1924); State of Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A.L.R. 984 (1920).

8 In re Heikich Terui, 187 Cal. 20, 200 P. 954, 17 A.L.R. 630 (1921).

9 Am. Jur. 2d, Ambassadors and Consuls §§ 6, 7.

10 In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 157 A.L.R. 87 (1944).

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§ 6. Negotiation and ratification

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West's Key Number Digest

West's Key Number Digest, Treaties 3

In every sovereign state or nation, the power of negotiating treaties with other nations is an inherent attribute of its sovereignty. Under the Federal Constitution,[1] the power to negotiate treaties is vested in the President.[2] Congress is powerless to invade the field of international negotiations.[3] However, while the President alone has the authority to negotiate and ratify treaties, he or she cannot act unilaterally.[4]

It is an implied condition in negotiating with foreign powers that the treaties concluded by the executive government will be subject to ratification in the manner prescribed by the fundamental laws of the state.[5] "Ratification" is often inadvertently or informally used to describe a vote by the Senate consenting to a treaty that has been sent to the Senate by the President for legislative consideration.[6] An unratified treaty has no force until ratified by a two-thirds vote of the Senate.[7] Under the domestic or "municipal" law of the United States, it is the province of the Senate to give its consent vel non to the treaty negotiated by the President and submitted to the Senate for its consideration; and if two-thirds of the Senators present their vote in favor of that treaty, the President may ratify it.[8] Ratification is not by itself sufficient to mandate the enforcement of a nonself-executing treaty.[9] Without congressional action, side agreements reached after a treaty has been ratified are not the law of the land; they are enforceable not through the federal courts but through international negotiations.[10] The court cannot enforce as laws those treaties, no matter how admirable their purposes, which Congress has not chosen to incorporate into the domestic legal system.[11]

Definition:

"Accession" is the act whereby a State accepts the offer or the opportunity of becoming a party to a treaty already signed by some other states.[12]

Footnotes

1 § 4.

2 Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303 (2d Cir. 1982), judgment aff'd, 466 U.S. 243, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984).

3 U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

4 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

5 In re Heikich Terui, 187 Cal. 20, 200 P. 954, 17 A.L.R. 630 (1921).

6 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005) (stating that as a matter of international law—the law governing relations among states inter se—Senate consent to a treaty is not synonymous with "ratification" and that Senate's approval, by itself, does not constitute consent to be bound by an international agreement).

7 Ehrlich v. American Airlines, Inc., 360 F.3d 366 (2d Cir. 2004).

8 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

9 Com. v. Judge, 591 Pa. 126, 916 A.2d 511 (2007).
As to self-executing treaties, see § 2.

10 Natural Resources Defense Council v. Environmental Protection Agency, 464 F.3d 1 (D.C. Cir. 2006).

11 Com. v. Judge, 591 Pa. 126, 916 A.2d 511 (2007).

12 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

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I. In General

§ 7. Effective date

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West's Key Number Digest

West's Key Number Digest, Treaties 9, 10

Under the principles of international law, treaties must be considered as taking effect from the date of their signature unless postponed by some condition or stipulation therein.[1] Thus, where, by its terms, a commercial treaty is not to go into effect until it has been approved by Congress, Congress may give it retrospective, immediate, or prospective operation.[2] However, the presumption is against an interpretation of the required act that would give the treaty a retrospective operation, especially where the treaty provides for reciprocal concessions, since by a retrospective interpretation of the treaty in the United States, it would go into operation therein prior to its operation in the other contracting country.[3] Words thus will not be construed to operate unless they are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.[4]

A State only becomes bound by a treaty, that is, becomes a party to a treaty, when it ratifies the treaty.[5]

Where the treaty operates on individual rights, the principle of relation does not apply to rights that were vested before the treaty was ratified. Insofar as it affects them, it is not considered as concluded until there is an exchange of ratifications.[6]

The date when a treaty is to go into effect will be fixed not by its provision that it is to become operative 10 days after exchange of ratifications but by an act of Congress where the Senate has added an amendment to the treaty declaring that it shall not take effect until approved by Congress.[7]

Footnotes

1 Lazarou v. Moraros, 101 N.H. 383, 143 A.2d 669 (1958).

2 U.S. v. American Sugar Refining Co., 202 U.S. 563, 26 S. Ct. 717, 50 L. Ed. 1149 (1906); Lazarou v. Moraros, 101 N.H. 383, 143 A.2d 669 (1958).

3 U.S. v. American Sugar Refining Co., 202 U.S. 563, 26 S. Ct. 717, 50 L. Ed. 1149 (1906).

4 U.S. v. American Sugar Refining Co., 202 U.S. 563, 26 S. Ct. 717, 50 L. Ed. 1149 (1906).

5 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

6 Board of County Com'rs of Dade County, Fla. v. Aerolineas Peruanasa, S. A., 307 F.2d 802 (5th Cir. 1962); Lazarou v. Moraros, 101 N.H. 383, 143 A.2d 669 (1958).

7 U.S. v. American Sugar Refining Co., 202 U.S. 563, 26 S. Ct. 717, 50 L. Ed. 1149 (1906).

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I. In General

§ 8. Modification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 6

A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.[1] The intention to abrogate or modify a treaty is not to be lightly imputed to Congress.[2] Legislation abrogating international agreements must be clear to ensure that Congress—and the President—have considered the consequences.[3] An ambiguous statute cannot supersede an international agreement if an alternative reading is fairly possible.[4] A treaty may be abrogated or modified by the enactment of a subsequent statute that is entirely inconsistent therewith.[5]

A court may not alter, amend, or add to any treaty, by inserting any clause.[6]

The effect of a treaty cannot be controlled by a Senate resolution adopted after the ratification of the treaty by a vote of less than two-thirds of a quorum. To be efficacious, such resolution must be considered either as an amendment to the treaty or as a legislative act qualifying or modifying the treaty, but it is neither.[7]

Footnotes

1 Weinstein v. Islamic Republic of Iran, 609 F.3d 43 (2d Cir. 2010), petition for cert. filed, 79 U.S.L.W. 3442, 80 U.S.L.W. 3015 (U.S. Jan. 18, 2011); Roeder v. Islamic Republic of Iran, 646 F.3d 56 (D.C. Cir. 2011).

2 Menominee Tribe of Indians v. U.S., 391 U.S. 404, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968).

3 Roeder v. Islamic Republic of Iran, 646 F.3d 56 (D.C. Cir. 2011).

4 Roeder v. Islamic Republic of Iran, 646 F.3d 56 (D.C. Cir. 2011).

5 § 15.

6 § 20.

7 The Diamond Rings, 183 U.S. 176, 22 S. Ct. 59, 46 L. Ed. 138 (1901).

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I. In General

§ 9. Termination

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 5

Compacts between nations are of different kinds and are terminable in different ways. Frequently, they are expressed to endure for a specified period of years. Even where some of their stipulations are in their terms perpetual, the obligations of treaties expire in case either of the contracting parties loses its existence as an independent state or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things. The political department of our government in several instances has considered treaties as terminated when the sovereignty of the nation with which treaties have been concluded is destroyed by its absorption into another sovereignty. However, where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.[1]

A treaty entered into with a sovereign inures to the benefit of a combination of nations subsequently formed with the sovereign as a nucleus.[2] When a colonized State earns its independence from its colonial nation, there is a presumption that prior treaties recognized by the former colonial power will devolve to the successor in interest nation.[3] The decision of the political department of government respecting the existence of a treaty must be accepted as conclusive by the judicial branch.[4] Governmental action must be regarded as of controlling importance in determining the status of treaties, and thus, the courts answer questions regarding the status of treaties following a change in the sovereign status of one of the relevant entities by deferring to the political branches' understanding of the resulting obligations.[5]

Footnotes

1 Terlinden v. Ames, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1902).

2 Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954).

3 U.S. ex rel. Saroop v. Garcia, 109 F.3d 165 (3d Cir. 1997).

4 Van Der Weyde v. Ocean Transport Co., 297 U.S. 114, 56 S. Ct. 392, 80 L. Ed. 515 (1936); Terlinden v. Ames, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1902).

5 New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 954 F.2d 847 (2d Cir. 1992); Mingtai Fire & Marine Ins. Co., Ltd. v. United Parcel Service, 177 F.3d 1142 (9th Cir. 1999).

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I. In General

§ 10. Termination—Effect of war

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 5

The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law.[1] Although the earlier writers on international law seem to have regarded treaties as indivisible contracts, no part of which could, unless otherwise agreed, remain in force unless all remained in force, and this view has been incidentally recognized by the courts, nevertheless, the tendency is toward a limitation of the general principle.[2] The outbreak of war between the contracting parties does not necessarily suspend or abrogate treaty provisions.[3] The chief judicial authority for the view that treaties are not ipso facto dissolved by war is an early United States Supreme Court case,[4] which declares that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war but are, at most, only suspended while it lasts, and unless they are waived by the parties, or new and repugnant stipulations are made, revive upon the return of peace. Under this view, the question whether the stipulations of a treaty are annulled by war depends on their intrinsic character.[5] Treaty provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected.[6] Thus, treaty provisions giving the right to citizens or subjects of one of the contracting powers to continue to hold and transmit land in the territory of the other survive the outbreak of war.[7] Generally, treaties of a political nature, treaties of alliance, and those that establish a protectorate or a sphere of influence fall in the event of war between the parties to such a treaty.[8] In contrast, treaties of boundary or cession, "dispositive" or "transitory" conventions, survive,[9] as do treaties that regulate the conduct of hostilities.[10] Treaties that are reasonably practicable to execute after the outbreak of hostilities must be observed then as in the past. The belligerents are at liberty to disregard them only to the extent and for the time required by the necessities of war.[11]

Footnotes

1 Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

2 Brownell v. City and County of San Francisco, 126 Cal. App. 2d 102, 271 P.2d 974 (1st Dist. 1954); State v. Reardon, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452 (1926).

3 Clark v. Allen, 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953 (1947); Argento v. Horn, 241 F.2d 258 (6th Cir. 1957).

4 Society for Propagation of Gospel in Foreign Parts v. Town of New Haven, 21 U.S. 464, 5 L. Ed. 662, 1823 WL 2477 (1823).

5 Karnuth v. U.S., on Petition of Albro, for Cook, 279 U.S. 231, 49 S. Ct. 274, 73 L. Ed. 677 (1929); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

6 Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

7 Clark v. Allen, 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953 (1947).

8 Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

9 In re Estate of Meyer, 107 Cal. App. 2d 799, 238 P.2d 597 (2d Dist. 1951).

10 Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

11 State v. Reardon, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452 (1926); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

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I. In General

§ 11. Observance and breach

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West's Key Number Digest

West's Key Number Digest, Treaties 6

Undoubtedly, the obligation of treaties is to be observed with entire good faith and scrupulous care.[1] A treaty depends for its enforcement on the honor and the interest of the parties to it, and if these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them.[2] The violation of a treaty obligation by one nation, although justifying the other nation in denouncing the treaty as no longer obligatory, does not automatically have that effect, but the treaty is only voidable, not void, and the breach may be waived with the result that the treaty remains in force.[3]

The question whether power remains in a foreign state to carry out its treaty obligations is political in nature and is no concern of the courts.[4] The settlement of rights between individuals under a treaty is for the courts,[5] but with regard to such rights as are purely political, the settlement is for Congress.[6]

Footnotes

1 Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).
2 § 33.
3 Charlton v. Kelly, 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274 (1913).
4 Terlinden v. Ames, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1902).
5 § 22.
6 U.S. v. O'Donnell, 303 U.S. 501, 58 S. Ct. 708, 82 L. Ed. 980 (1938).

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II. Relation of Treaty to Other Laws and Statutes

§ 12. Generally

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West's Key Number Digest

West's Key Number Digest, Treaties 11

The United States Constitution expressly defines the status of treaties of the United States in the following provision: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[1] The principle that all treaties are the supreme law of the land applies with full force to treaties with the Native American nations.[2]

Congress is empowered to enact any law that is necessary and proper to effectuate a treaty made pursuant to the Constitution.[3] Treaties are not domestic law unless Congress either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms.[4] Federal courts are bound to give effect to international law and to international agreements except that a nonself-executing agreement will not be given effect as law in the absence of the necessary authority.[5] Even when treaties are self-executing in the sense that they create federal law, the background presumption is that, generally, international agreements, even those directly benefiting private persons, do not create private rights or provide for a private cause of action in domestic courts.[6]

Treaties are placed on the same footing as legislation enacted by the United States Congress, and while neither is superior to the other, both are subject to the United States Constitution.[7] Treaties are part of the law of the land; they have no greater or lesser impact than other federal laws.[8] A treaty, to the extent that it is self-executing, has the force and effect of a legislative enactment and to all intents and purposes is the equivalent of an act of Congress.[9] It is binding upon all courts, state and national, as the supreme law of the land.[10]

Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty.[11] Moreover, the existence of slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional since identicality is not required.[12]

Observation:

United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both.[13]

Practice Tip:

"Jus cogens norms," which are derived from values taken to be fundamental by the international community, are binding on all nations and cannot be preempted by a treaty.[14]

CUMULATIVE SUPPLEMENT

Cases:

Maritime Drug Law Enforcement Act (MDLEA) was not a valid exercise of Congress's authority under the Necessary and Proper Clause to effectuate the subsequently enacted Convention Against Illicit Traffic Treaty or Jamaica Bilateral Agreement between the United States and Jamaica, as applied to defendants, foreign nationals who were seized while aboard foreign vessel in territorial waters of Jamaica and subsequently charged under MDLEA with possessing and conspiring to possess with intent to distribute marijuana; MDLEA was enacted long before the Convention against Illicit Traffic Treaty or the Jamaica Bilateral Agreement, and nothing in MDLEA's legislative history mentioned a treaty or intimated that the legislation was in compliance with treaty obligations. U.S. Const. art. 1, § 8, cl. 18; U.S. Const. art. 2, § 2, cl. 2. United States v. Davila-Mendoza, 972 F.3d 1264 (11th Cir. 2020).

Neither foreign corporate taxpayer's decision matrix, nor its decision to leave Ireland in favor of Switzerland, inevitably led to conclusion that bilateral tax treaty benefits in United States treaty with Switzerland were not a principal concern for taxpayer when it chose to relocate, such that denial of treaty benefits by Treasury Department's Competent Authority based on finding that one of taxpayer's principal purposes in relocation to Switzerland was obtaining tax benefits was not arbitrary and capricious under the Administrative Procedure Act (APA); taxpayer's decision matrix was created years after move to Switzerland, and matrix revealed that United States tax considerations were a top priority in selecting new home. 5 U.S.C.A. § 706; U.S.–Swiss Tax Treaty art. XXII(6). Starr International Company, Inc. v. United States, 275 F. Supp. 3d 228 (D.D.C. 2017).

Treaty is placed on same footing, and in order of like obligation, with legislative acts; both are declared by instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. U.S.C.A. Const. Art. 6, cl. 2. In re World Imports, Ltd., 511 B.R. 738 (Bankr. E.D. Pa. 2014).

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Art. VI.

2 People v. Patterson, 5 N.Y.3d 91, 800 N.Y.S.2d 80, 833 N.E.2d 223 (2005).

3 U.S. v. Belfast, 611 F.3d 783 (11th Cir. 2010), cert. denied, 131 S. Ct. 1511, 179 L. Ed. 2d 334 (2011).

4 Igartua-De La Rosa v. U.S., 417 F.3d 145 (1st Cir. 2005).

5 Renkel v. U.S., 456 F.3d 640, 65 Fed. R. Serv. 3d 1129, 2006 FED App. 0274P (6th Cir. 2006).

6 McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008);
Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

7 Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).
Treaties sometimes have the force of domestic law, but neither a statute nor a treaty can override the United States Constitution since the Constitution is the supreme law of the land. Igartua-De La Rosa v. U.S., 417 F.3d 145 (1st Cir. 2005).

8 O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170 (10th Cir. 2003), on reh'g en banc, 389 F.3d 973 (10th Cir. 2004), aff'd and remanded, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006); State v. Homdziuk, 369 N.J. Super. 279, 848 A.2d 853 (App. Div. 2004).

9 Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1936); Cheung v. U.S., 213 F.3d 82 (2d Cir. 2000); Palermo v. Stockton Theatres, 32 Cal. 2d 53, 195 P.2d 1 (1948).

10 § 32.

11 Safety Nat. Cas. Corp. v. Certain Underwriters At Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), cert. denied, 131 S. Ct. 65, 178 L. Ed. 2d 22 (2010).

12 U.S. v. Belfast, 611 F.3d 783 (11th Cir. 2010), cert. denied, 131 S. Ct. 1511, 179 L. Ed. 2d 334 (2011).

13 Yuen Jin v. Mukasey, 538 F.3d 143 (2d Cir. 2008).

14 U.S. v. Struckman, 611 F.3d 560 (9th Cir. 2010).

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§ 13. Conflict with federal law

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Validity, Construction, and Application of Mutual Legal Assistance Treaties (MLATs), 79 A.L.R. Fed. 2d 375

Law Reviews and Other Periodicals

Joshua, Camesasca, Jung, Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach, 75 Antitrust L.J. 353 (2008)

Manifestly, a treaty cannot run counter to the United States Constitution[1] nor are treaties of any greater legal obligation than acts of Congress.[2] Accordingly, while a state law may be void as inconsistent with a treaty,[3] an act of Congress cannot be similarly declared to be invalid; when both the treaty and the act of Congress relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either.[4] However, if the two are inconsistent, the one with the later date will control the other[5] provided always that the stipulation of the treaty on the subject is self-executing.[6] Thus, the later-in-time rule applies to resolve a conflict between a treaty and a statute.[7] Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed but must appear clearly and distinctly from the words used in the statute

or in the treaty.[8] The provisions of an act of Congress, passed in the exercise of its constitutional authority, if clear and explicit, must be upheld by the courts even in contravention of express stipulations in an earlier treaty with a foreign power.[9] It is the duty of the court, if possible, to find an interpretation of the statute that will involve no infraction of the treaty—no violation of the pledged faith of the government of the United States to the government of another country.[10] More specifically, acts of Congress should not be construed to conflict with international treaty obligations,[11] or stated somewhat differently, federal law must be strictly construed to avoid conflict with treaty obligations.[12]

Repeals by implication are never favored, and none will be recognized unless the two expressions—treaty and statute—are absolutely incompatible.[13]

CUMULATIVE SUPPLEMENT

Cases:

Foreign Sovereign Immunities Act (FSIA) treaty exception did not apply to 1973 Agreement between Hungary and United States such that Treaty did not bar jurisdiction under expropriation exception for FSIA over claims by descendants of Jewish Hungarian art collector, alleging breach of bailment agreements for paintings not returned upon demand. 28 U.S.C.A. §§ 1604, 1605(a)(3). de Csepel v. Republic of Hungary, 169 F. Supp. 3d 143 (D.D.C. 2016).

[END OF SUPPLEMENT]

Footnotes

1 § 4.

2 § 12.

3 § 16.

4 Cook v. U.S., 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933); Rainey v. U.S., 232 U.S. 310, 34 S. Ct. 429, 58 L. Ed. 617 (1914); Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

5 Cook v. U.S., 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933); Weber v. Finker, 554 F.3d 1379 (11th Cir. 2009), cert. denied, 130 S. Ct. 59, 175 L. Ed. 2d 23 (2009); Haver v. C.I.R., 444 F.3d 656 (D.C. Cir. 2006); Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

6 Cook v. U.S., 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933); Rainey v. U.S., 232 U.S. 310, 34 S. Ct. 429, 58 L. Ed. 617 (1914); Ex parte Webb, 225 U.S. 663, 32 S. Ct. 769, 56 L. Ed. 1248 (1912).

7 Safety Nat. Cas. Corp. v. Certain Underwriters At Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), cert. denied, 131 S. Ct. 65, 178 L. Ed. 2d 22 (2010); Jamieson v. C.I.R., T.C. Memo. 2008-118, T.C.M. (RIA) P 2008-118 (2008), aff'd, 584 F.3d 1074 (D.C. Cir. 2009) (under the last-in-time rule, conflicts between a revenue law and a treaty are resolved by applying the principle that the provision adopted later in time controls).

8 Pigeon River Imp., Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 54 S. Ct. 361, 78 L. Ed. 695 (1934); Cook v. U.S., 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933).

9 U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986).

10 U.S. v. Lee Yen Tai, 185 U.S. 213, 22 S. Ct. 629, 46 L. Ed. 878 (1902); U.S. v. Gue Lim, 176 U.S. 459, 20 S. Ct. 415, 44 L. Ed. 544 (1900).

11 Moore v. United Kingdom, 384 F.3d 1079 (9th Cir. 2004).

12 Ventress v. Japan Airlines, 486 F.3d 1111 (9th Cir. 2007).

13 § 20.

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II. Relation of Treaty to Other Laws and Statutes

§ 14. Conflict with federal law—With prior statute

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West's Key Number Digest

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The United States may by a self-executing treaty supersede a prior act of Congress on the same subject,[1] otherwise, the declaration in the Constitution that a treaty concluded in the mode prescribed by that instrument shall be the supreme law of the land would not have due effect.[2] On the other hand, a treaty provision will not have the effect of suspending the operation of a statute where the treaty is not self-executing, and legislation has not been enacted to put it into effect.[3] Moreover, a later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible, and the statute cannot be enforced without violating the treaty.[4]

Footnotes

1 Cook v. U.S., 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933); U.S. v. Lee Yen Tai, 185 U.S. 213, 22 S. Ct. 629, 46 L. Ed. 878 (1902).

2 Ribas y Hijo v. U.S., 194 U.S. 315, 24 S. Ct. 727, 48 L. Ed. 994 (1904); U.S. v. Lee Yen Tai, 185 U.S. 213, 22 S. Ct. 629, 46 L. Ed. 878 (1902).

3 Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 33 S. Ct. 209, 57 L. Ed. 407 (1913).

4 § 13.

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§ 15. Conflict with federal law—With subsequent statute

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West's Key Number Digest

West's Key Number Digest, Treaties 11

Where the terms of a treaty and of a subsequent act of Congress come into conflict, the act of Congress will control.[1] Because an act of Congress is on a full parity with a treaty,[2] when a statute that is subsequent in time is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty null.[3] A ratified self-executing treaty generally stands on the same footing as a federal statute, that is, a later-in-time self-executing treaty has the same effect on an existing federal statute as a later-in-time act of Congress.[4] It is within Congress' power to change domestic law even if the law originally arose from a self-executing international treaty.[5]

Legislative acts trump treaty-made international law when those acts are passed subsequent to ratification of the treaty and clearly contradict treaty obligations.[6] Thus, an act of Congress will govern in domestic courts in derogation of previous treaties.[7]

Acts of Congress should not be construed to conflict with international treaty obligations.[8] Before the courts will impute to Congress an intention to violate the provisions of a treaty, that intention must be clearly and unequivocally manifested.[9]

The courts apply a statute according to its terms even if the statute conflicts with a prior treaty, but where fairly possible, the courts tend to construe an ambiguous statute not to conflict with a prior treaty.[10]

Footnotes

1 Moser v. United States, 341 U.S. 41, 71 S. Ct. 553, 95 L. Ed. 729 (1951); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

2 Safety Nat. Cas. Corp. v. Certain Underwriters at Lloyd's, London, 543 F.3d 744 (5th Cir. 2008), reh'g en banc granted, 558 F.3d 599 (5th Cir. 2009) and on reh'g en banc, 587 F.3d 714 (5th Cir. 2009), cert. denied, 131 S. Ct. 65, 178 L. Ed. 2d 22 (2010); Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009), cert. denied, 130 S. Ct. 1002, 175 L. Ed. 2d 1098 (2010).

3 Breard v. Greene, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998); Safety Nat. Cas. Corp. v. Certain Underwriters at Lloyd's, London, 543 F.3d 744 (5th Cir. 2008), reh'g en banc granted, 558 F.3d 599 (5th Cir. 2009) and on reh'g en banc, 587 F.3d 714 (5th Cir. 2009), cert. denied, 131 S. Ct. 65, 178 L. Ed. 2d 22 (2010); Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009), cert. denied, 130 S. Ct. 1002, 175 L. Ed. 2d 1098 (2010); Bell v. Office of Personnel Management, 169 F.3d 1383 (Fed. Cir. 1999).

4 In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011).

5 Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009), cert. denied, 130 S. Ct. 1002, 175 L. Ed. 2d 1098 (2010).

6 Empresa Cubana del Tabaco v. Culbro Corp., 399 F.3d 462 (2d Cir. 2005).

7 Pierre v. Gonzales, 502 F.3d 109 (2d Cir. 2007).

8 Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996).

9 Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116 (2d Cir. 2000); Blanco v. U.S., 775 F.2d 53 (2d Cir. 1985).

10 Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006).

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74 Am. Jur. 2d Treaties § 16

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II. Relation of Treaty to Other Laws and Statutes

§ 16. Conflict with state law

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Forms

Am. Jur. Pleading and Practice Forms, Treaties § 3 (Complaint, petition, or declaration—To enjoin enforcement of municipal ordinance violating treaty—By resident alien)

Am. Jur. Pleading and Practice Forms, Treaties § 4 (Complaint, petition, or declaration—For refund of personal property tax—Assessment in violation of treaty)

It is the necessary result of the explicit declarations of the Federal Constitution[1] that where there is a conflict between a treaty and the provisions of a state constitution or of a state statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control.[2] In other words, a ratified treaty takes precedence over conflicting state laws under the Supremacy Clause of the United States Constitution.[3] The Supremacy Clause requires invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties, and therefore, the determination rests on whether the state law impermissibly interferes with federal law and is thus preempted.[4] State law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.[5] Indeed, a treaty preempts inconsistent state law,[6] but a treaty may not be construed as preempting state law or any court procedures in the absence of a clear intent to do so.[7]

Although the preemption of state laws by a treaty is generally disfavored,[8] nevertheless, the provisions of the treaty supersede and render nugatory all conflicting provisions in the laws or constitution of any state.[9] Moreover, a treaty implemented by a federal statute overrides a state law or judgment.[10]

Even sole-executive agreements override inconsistent state law.[11] Valid executive agreements are accorded the same status as treaties and, consequently, may preempt state law if they impair the effective exercise of the nation's foreign policy.[12]

Where state laws conflict with a treaty, they must bow to the superior federal policy.[13] Also, the power of a State to refuse enforcement of rights based on a foreign law that runs counter to its public policy must give way before a superior federal policy evidenced by a treaty or international compact or agreement.[14]

A treaty does not automatically supersede local laws that are inconsistent with it unless the treaty provisions are self-executing.[15] The language of a treaty, wherever reasonably possible, will be construed so as not to override state laws or to impair rights arising under them,[16] and a treaty will be carefully construed so as not to derogate from the authority and jurisdiction of a state unless such a result is clearly necessary to effectuate the national policy.[17] Thus, the effect of a treaty is not to nullify a conflicting statute but rather to suspend it in its application to a citizen of the country with which the treaty is made.[18]

A treaty is supreme only when it is made in pursuance of that authority that has been conferred on the treaty-making department, and in relation to those subjects, the jurisdiction over which has been exclusively entrusted to Congress.[19]

It is well settled that a treaty provision will not operate to supersede or suspend a state statute if the treaty is not self-executing and if no implementing legislation has been enacted.[20]

When there is no conflict between a treaty and state law, the state law remains unaffected.[21]

A treaty entered into by the United States is binding on Puerto Rico and cannot be overridden by the Puerto Rican legislature.[22]

CUMULATIVE SUPPLEMENT

Cases:

A state law that burdens a treaty-protected right is preempted by the treaty. (Per Justice Breyer, with two justices concurring and two justices concurring in the judgment.) Washington State Department of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019).

[END OF SUPPLEMENT]

Footnotes

1 § 4.

2 Zschernig v. Miller, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968); Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dept. of Natural Resources, 141 F.3d 635, 1998 FED App. 0109P (6th Cir. 1998); In re Estate of Meyer, 107 Cal. App. 2d 799, 238 P.2d 597 (2d Dist. 1951).

3 Camphor Technologies, Inc. v. Biofer, S.P.A., 50 Conn. Supp. 227, 916 A.2d 142 (Super. Ct. 2007).

4 State v. Gonzalez-Perez, 997 So. 2d 1 (La. Ct. App. 1st Cir. 2008), writ denied, 23 So. 3d 930 (La. 2009).

5 Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

6 Ventress v. Japan Airlines, 486 F.3d 1111 (9th Cir. 2007).

7 In re Guardianship of Ariana K., 120 Cal. App. 4th 690, 15 Cal. Rptr. 3d 817 (2d Dist. 2004), as modified, (July 14, 2004).

8 Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., Ltd., 522 F.3d 776 (7th Cir. 2008).

9 Clark v. Allen, 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953 (1947); State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953); Hanafin v. McCarthy, 95 N.H. 36, 57 A.2d 148 (1948); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

10 Altamiranda Vale v. Avila, 538 F.3d 581 (7th Cir. 2008).

11 Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004) (Foundation Agreement between United States and Germany establishing foundation to hear claims brought by victims of Nazi regime).

12 Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

13 Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898 (5th Cir. 2005).

14 Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961); U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).

15 Sharifi v. State, 993 So. 2d 907 (Ala. Crim. App. 2008); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

16 Guaranty Trust Co. of New York v. U.S., 304 U.S. 126, 58 S. Ct. 785, 82 L. Ed. 1224 (1938); Wyers v. Arnold, 347 Mo. 413, 147 S.W.2d 644, 134 A.L.R. 876 (1941).

17 U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).

18 Ahrens v. Ahrens, 144 Iowa 486, 123 N.W. 164 (1909); In re Stixrud's Estate, 58 Wash. 339, 109 P. 343 (1910).

19 § 5.

20 Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 33 S. Ct. 209, 57 L. Ed. 407 (1913); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952); Milliken v. State, 131 So. 2d 889 (Fla. 1961).

21 Hamilton v. Regents of the University of Calif., 293 U.S. 245, 55 S. Ct. 197, 79 L. Ed. 343 (1934); Todok v. Union State Bank of Harvard, Neb., 281 U.S. 449, 50 S. Ct. 363, 74 L. Ed. 956 (1930); In re Servas' Estate, 169 Cal. 240, 146 P. 651 (1915).

22 Bacardi Corporation of America v. Domenech, 311 U.S. 150, 61 S. Ct. 219, 85 L. Ed. 98 (1940).

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II. Relation of Treaty to Other Laws and Statutes

§ 17. Conflict with state law—Presumptions and inferences

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The presumption is against any intention on the part of the federal government to invade by treaty the province of state law in matters inherently local.[1] Treaties with foreign countries must be held to have been made with reference to the rightful exercise of the police power by the different states in aid of the protection and preservation of the public health within their respective borders.[2] It may be inferred from the decisions of the United States Supreme Court that a treaty will, if possible, be given a restricted construction where a broader construction would infringe upon a special power of the state over the subject matter.[3]

Footnotes

1 In re Servas' Estate, 169 Cal. 240, 146 P. 651 (1915); In re Lis' Estate, 120 Minn. 122, 139 N.W. 300 (1912).

2 Compagnie Francaise de Navigation a Vapeur v. State Board of Health, 51 La. Ann. 645, 25 So. 591 (1899), aff'd, 186 U.S. 380, 22 S. Ct. 811, 46 L. Ed. 1209 (1902).

3 Heim v. McCall, 239 U.S. 175, 36 S. Ct. 78, 60 L. Ed. 206 (1915); Patsone v. Com. of Pennsylvania, 232 U.S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1914).

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§ 18. Generally

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Validity, Construction, and Application of Mutual Legal Assistance Treaties (MLATs), 79 A.L.R. Fed. 2d 375

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Joshua, Camesasca, Jung, Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach, 75 Antitrust L.J. 353 (2008)

The interpretation of a treaty should be guided by principles similar to those governing statutory interpretation.[1] Also, certain technical rules of interpretation have been adopted to explain the meaning of international compacts in cases of doubt.[2] Moreover, where a statute and treaty pertain to the same subject matter, they must be read so as to give effect to both if at all possible.[3]

The interpretation of a treaty, like the interpretation of a statute, begins with the text of the treaty[4] and the context in which the written words are used.[5] In construing a treaty, as in construing a statute, the court first looks to its terms to determine its meaning

as intended by the signatories.[6] When construing a treaty, a court must examine not only the language but also the entire context of the agreement,[7] and when the text of the treaty is ambiguous or unclear, the court turns to nontextual sources for guidance.[8]

While the court's task in interpreting a treaty is ordinarily to give it a meaning consistent with the shared expectations of the contracting parties,[9] where the President and the Senate have expressed a shared consensus on the meaning of the treaty as part of the ratification process, that meaning is to govern in the domestic context.[10]

If the plain text of a treaty is ambiguous, the court may look to other sources, such as the postratification understanding of the contracting parties to elucidate the treaty's meaning.[11] Indeed, when interpreting international agreements, the court must consult the postratification understanding of the signatory nations.[12] When a treaty is reasonably susceptible to more than one interpretation, secondary sources must be employed to ascertain the appropriate meaning, and in so doing, the court strives to conform its reading to the treaty's original intent and purpose.[13]

Since a treaty when executed is a part of the municipal law of the land,[14] a treaty is to be construed on principles similar to those applied to other written contracts and statutes,[15] and the cognate rules of international law and of the legislation of the government may be considered.[16] As a contract between independent nations, a treaty must, if possible, be construed to give full force and effect to its parts,[17] which bind the contracting powers.[18] An exception to the rule of treaty interpretation is Indian treaties, which are not to be read as ordinary contracts agreed upon by the parties dealing at arm's length with equal bargaining positions.[19]

Because a treaty ratified by the United States is an agreement among sovereign powers, the Supreme Court also considers as aids to its interpretation the treaty's negotiation and drafting history, as well as the postratification understanding of the signatory nations.[20]

Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between the national legal systems.[21]

CUMULATIVE SUPPLEMENT

Cases:

In interpreting treaties, courts begin with the text of the treaty and the context in which the written words are used. Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017).

For treaties, which are primarily compacts between independent nations, a court's duty is to ascertain the intent of the parties by looking to the document's text and context. Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014).

It is a court's responsibility to read a treaty in a manner consistent with the shared expectations of the contracting parties. Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014).

Even if a background principle is relevant to the interpretation of federal statutes, it has no proper role in the interpretation of treaties unless that principle is shared by the parties to an agreement among sovereign powers. Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014).

Normally, interpretation of treaty, like interpretation of contract, is matter of determining parties' intent. BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014).

[END OF SUPPLEMENT]

Footnotes

1 Collins v. National Transp. Safety Bd., 351 F.3d 1246 (D.C. Cir. 2003).

2 Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933); Maiorano v. Baltimore & O. R. Co., 216 Pa. 402, 65 A. 1077 (1907), aff'd, 213 U.S. 268, 29 S. Ct. 424, 53 L. Ed. 792 (1909).

3 Jamieson v. C.I.R., T.C. Memo. 2008-118, T.C.M. (RIA) P 2008-118 (2008), aff'd, 584 F.3d 1074 (D.C. Cir. 2009).

4 Abbott v. Abbott, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010); Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008); Mora v. New York, 524 F.3d 183 (2d Cir. 2008); Delta Air Lines, Inc. v. Chimet, S.p.A., 619 F.3d 288 (3d Cir. 2010); U.S. v. Jeong, 624 F.3d 706 (5th Cir. 2010); In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011); Pierre-Louis v. Newvac Corp., 584 F.3d 1052 (11th Cir. 2009), cert. denied, 130 S. Ct. 3387, 177 L. Ed. 2d 303 (2010).

5 Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985); Mora v. New York, 524 F.3d 183 (2d Cir. 2008); Delta Air Lines, Inc. v. Chimet, S.p.A., 619 F.3d 288 (3d Cir. 2010); Pierre-Louis v. Newvac Corp., 584 F.3d 1052 (11th Cir. 2009), cert. denied, 130 S. Ct. 3387, 177 L. Ed. 2d 303 (2010); Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008); Park v. C.I.R., Tax Ct. Rep. (CCH) 58657, Tax Ct. Rep. Dec. (RIA) 136.28, 2011 WL 2416266 (T.C. 2011).

6 Sacirbey v. Guccione, 589 F.3d 52 (2d Cir. 2009); U.S. v. Al-Hamdi, 356 F.3d 564, 1 A.L.R. Fed. 2d 695 (4th Cir. 2004); Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007); Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir. 2007); State v. Aydiner, 228 Or. App. 282, 208 P.3d 515 (2009), review denied, 347 Or. 259, 218 P.3d 541 (2009) and cert. denied, 131 S. Ct. 530, 178 L. Ed. 2d 374 (2010).

7 National Westminster Bank, PLC v. U.S., 512 F.3d 1347 (Fed. Cir. 2008).

8 U.S. v. Al-Hamdi, 356 F.3d 564, 1 A.L.R. Fed. 2d 695 (4th Cir. 2004).

9 El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999); Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005); U.S. v. Belfast, 611 F.3d 783 (11th Cir. 2010), cert. denied, 131 S. Ct. 1511, 179 L. Ed. 2d 334 (2011).

10 Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005); U.S. v. Belfast, 611 F.3d 783 (11th Cir. 2010), cert. denied, 131 S. Ct. 1511, 179 L. Ed. 2d 334 (2011).

11 Ehrlich v. American Airlines, Inc., 360 F.3d 366 (2d Cir. 2004).

12 Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010), cert. denied, 131 S. Ct. 2874, 179 L. Ed. 2d 1187 (2011).

13 Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A., 347 F.3d 448 (2d Cir. 2003).

14 § 3.

15 Sullivan v. Kidd, 254 U.S. 433, 41 S. Ct. 158, 65 L. Ed. 344 (1921); Kahn Lucas Lancaster, Inc. v. Lark Intern. Ltd., 186 F.3d 210 (2d Cir. 1999).

16 Santovincenzo v. Egan, 284 U.S. 30, 52 S. Ct. 81, 76 L. Ed. 151 (1931); Tashiro v. Jordan, 201 Cal. 236, 256 P. 545, 53 A.L.R. 1279 (1927), aff'd, 278 U.S. 123, 49 S. Ct. 47, 73 L. Ed. 214 (1928); In re Anderson's Estate, 166 Iowa 617, 147 N.W. 1098 (1914), aff'd, 245 U.S. 170, 38 S. Ct. 109, 62 L. Ed. 225 (1917); Trott v. State, 41 N.D. 614, 171 N.W. 827, 4 A.L.R. 1372 (1919).

17 Mangattu v. M/V Ibn Hayyan, 35 F.3d 205 (5th Cir. 1994).

18 Humane Soc. of the U.S. v. Glickman, 217 F.3d 882 (D.C. Cir. 2000).

19 McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973).
As to the rules applicable to the construction and interpretation of Indian treaties, see § 30.

20 Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

21 In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011).

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§ 19. Power and function of courts

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Establishment of Person's Domicil, 39 Am. Jur. Proof of Facts 2d 587
Law of Foreign Jurisdiction, 21 Am. Jur. Proof of Facts 2d 1
Matrimonial Dispute: Vexatious Choice of Forum, 16 Am. Jur. Proof of Facts 2d 175
Nonestablishment of Domicil in Foreign Jurisdiction, 4 Am. Jur. Proof of Facts 2d 595
Denial of Child Visitation Rights, 2 Am. Jur. Proof of Facts 2d 791

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Browne, Relevance And Fairness: Protecting the Rights Of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction, 60 Duke L.J. 1193 (2011)

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Jones, A Ne Exeat Right Is a "Right of Custody" for the Purposes of the Hague Convention: Abbott v. Abbott, 49 Duq. L. Rev. 523 (2011)

Kevin, to Comply or Not to Comply? Brazil's Relationship With the Hague Convention on the Civil Aspects of International Child Abduction, 39 Ga. J. Int'l & Comp. L. 271 (2010)

Lesh, Jurisdiction Friction And the Frustration of the Hague Convention: Why International Child Abduction Cases Should Be Heard Exclusively By Federal Courts, 49 Fam. Ct. Rev. 170 (2011)

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Stark, The Internationalization of American Family Law, 24 J. Am. Acad. Matrim. Law. 467 (2012)

Vivatvaraphol, Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention, 77 Fordham L. Rev. 3325 (2009)

It is the court's role to construe international agreements, not to rewrite them.[1] When the language of an international treaty is plain, the court must refrain from amending it because doing so would be to make, and not to construe, a treaty.[2]

While the courts interpret treaties for themselves, the meaning given them by the government agencies particularly charged with their negotiation and enforcement is entitled to great weight.[3] Indeed, the interpretation of a treaty by the executive branch is entitled to great weight.[4] Respect is ordinarily due the reasonable views of the executive branch concerning the meaning of an international treaty,[5] and isolated past inconsistencies do not diminish the deference that courts owe the clearly espoused views of the executive branch in the realm of treaty interpretation.[6] More particularly, the state department's interpretation of any international treaty is entitled to substantial weight because that department of the federal executive branch is responsible for negotiating and administering treaties and also because it generally is the single authoritative voice through which the executive branch speaks.[7] While a court will give deference to the consistent interpretation of a treaty advanced by the agencies of the United States charged with its administration, their interpretation is not conclusive and will not be adopted by the court if it is not supported by the treaty language or the intent of the parties.[8]

In interpreting any treaty, the opinions of sister signatories are also entitled to considerable weight.[9] Indeed, in construing a treaty, the court must consider the expectations of both signatories to the treaty, not just the expectations of the United States.[10]

Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested and that presumption has special force when a court is construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.[11] However, the courts are not required to give a strained construction to the language of a treaty, or to place an unreasonable interpretation upon it, for the purpose of securing privileges for foreigners that denied the citizens.[12]

A court in the United States is not bound either to give the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, any particular weight when considering the text and context of a treaty, or to treat it as having any dispositive effect in the event of ambiguity; accordingly, the respectful consideration owed to the interpretation of an international court is similar to the treatment of agency opinion letters and enforcement manuals.[13] Thus, the decisions of the International Court of Justice, which do have binding force on the parties as a matter of international law, are not binding with regard to interpretations of treaties as a matter of United States law.[14] The interpretation of a treaty by an international court is entitled to respect but only to the extent that it has the power to persuade; the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.[15]

Practice Tip:

The meaning of the language used in a treaty is a question of law.[16]

CUMULATIVE SUPPLEMENT

Cases:

Interpretation of a treaty by the Executive Branch is entitled to great weight. Republic of Sudan v. Harrison, 139 S. Ct. 1048 (2019).

A court gives great weight to the Executive Branch's interpretation of a treaty. Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017).

There is no general presumption that equitable tolling applies to treaties. Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014).

Arbitrators' decision, in concluding that foreign investor in Argentinian entity was excused from having to comply with local court litigation requirement in arbitration provisions of investment treaty between United Kingdom and Argentina, by first filing suit in Argentine court and waiting for 18 months prior to submitting matter for international arbitration, as result of conduct by the Argentine government which interfered with this judicial remedy by suspending Argentine courts' ability to enter final judgments and by refusing to allow parties engaged in litigation with the Argentine government to utilize contract renegotiation process, did not stray from interpretation and application of arbitration provisions in treaty, and could not be disturbed by court. Agreement for the Promotion and Protection of Investments, Art. 8(2), 1765 U.N.T.S. 33. BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014).

Government's interpretation of its own agreements with foreign countries is entitled to great weight. Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, Inc., 984 F. Supp. 2d 1070 (S.D. Cal. 2013).

[END OF SUPPLEMENT]

Footnotes

1 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

2 Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A., 347 F.3d 448 (2d Cir. 2003); Ehrlich v. American Airlines, Inc., 360 F.3d 366 (2d Cir. 2004).

3 Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001); Baxter v. Baxter, 423 F.3d 363 (3d Cir. 2005); Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005); U.S. v. Al-Hamdi, 356 F.3d 564, 1 A.L.R. Fed. 2d 695 (4th Cir. 2004); U.S. v. Page, 232 F.3d 536, 2000 FED App. 0388P (6th Cir. 2000); Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir. 2007); National Westminster Bank, PLC v. U.S., 512 F.3d 1347 (Fed. Cir. 2008).

4 Abbott v. Abbott, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010); Swarna v. Al-Awadi, 622 F.3d 123, 77 Fed. R. Serv. 3d 785 (2d Cir. 2010); In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011); Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005).

5 El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999); Fund for Animals v. Kempthorne, 538 F.3d 124 (2d Cir. 2008).

6 Mora v. New York, 524 F.3d 183 (2d Cir. 2008).

7 People v. Montano, 365 Ill. App. 3d 195, 302 Ill. Dec. 317, 848 N.E.2d 616 (2d Dist. 2006); State v. Sanchez-Llamas, 338 Or. 267, 108 P.3d 573 (2005), judgment aff'd, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006).

8 National Westminster Bank, PLC v. U.S., 58 Fed. Cl. 491 (2003), aff'd, 512 F.3d 1347 (Fed. Cir. 2008).

9 Abbott v. Abbott, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010); Ehrlich v. American Airlines, Inc., 360 F.3d 366 (2d Cir. 2004).

10 National Westminster Bank, PLC v. U.S., 58 Fed. Cl. 491 (2003), aff'd, 512 F.3d 1347 (Fed. Cir. 2008).

11 Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993).

12 Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933).

13 Mora v. New York, 524 F.3d 183 (2d Cir. 2008).

14 Com. v. Judge, 591 Pa. 126, 916 A.2d 511 (2007).

15 Mora v. New York, 524 F.3d 183 (2d Cir. 2008).

16 Swarna v. Al-Awadi, 622 F.3d 123, 77 Fed. R. Serv. 3d 785 (2d Cir. 2010); Pocatello v. State, 145 Idaho 497, 180 P.3d 1048 (2008); In re Estate of Graf Droste Zu Vischering, 782 N.W.2d 141 (Iowa 2010).

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III. Construction

§ 20. Power and function of courts—Omissions, insertions, and implications

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

Where the text of a treaty is clear, a court interpreting the treaty has no power to insert an amendment.[1] A court may not alter, amend, or add to the plain language of any treaty,[2] by inserting any clause, whether small or great, important or trivial, because doing so would be a usurpation of power by the court and not an exercise of judicial functions; to do so would be to make and not to construe a treaty.[3] The courts are bound to give effect to the stipulations of a treaty in the manner and to the extent that the parties have declared and not otherwise.[4]

Treaties are the subject of careful consideration before they are entered into and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high-contracting parties.[5] Diplomats read the public treaties made by other nations and cannot be supposed either to omit or insert an article common in public treaties without being aware of the effect of such omission or insertion. Neither the omission nor the insertion is to be ascribed to inattention. Also, if an article alleged to be omitted is not necessarily implied in one that is inserted, the corresponding subject remains under the previously existing rule.[6] However, repeals by implication are never favored, and a later treaty or statute will not be regarded as repealing an earlier enactment by implication unless the two are absolutely incompatible, and the latter cannot be enforced without antagonizing the earlier.[7]

Footnotes

1 Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010), cert. denied, 131 S. Ct. 2874, 179 L. Ed. 2d 1187 (2011).

2 Maritime Ins. Co. Ltd. v. Emery Air Freight Corp., 983 F.2d 437 (2d Cir. 1993); U.S. v. Jeong, 624 F.3d 706 (5th Cir. 2010).

3 Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301 (2d Cir. 2000); Kass v. Reno, 83 F.3d 1186 (10th Cir. 1996); In re Guardianship of Ariana K., 120 Cal. App. 4th 690, 15 Cal. Rptr. 3d 817 (2d Dist. 2004), as modified, (July 14, 2004).

4 International Bank for Reconstruction and Development v. District of Columbia, 171 F.3d 687 (D.C. Cir. 1999).

5 Rocca v. Thompson, 223 U.S. 317, 32 S. Ct. 207, 56 L. Ed. 453 (1912).

6 Rocca v. Thompson, 223 U.S. 317, 32 S. Ct. 207, 56 L. Ed. 453 (1912).

7 Johnson v. Browne, 205 U.S. 309, 27 S. Ct. 539, 51 L. Ed. 816 (1907); John T. Bill Co. v. U.S., 104 F.2d 67 (C.C.P.A. 1939).

As to the termination of treaties, generally, see § 9.

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III. Construction

§ 21. Liberal or strict construction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

Liberality is one of the foremost rules of treaty interpretation,[1] and in fact, treaties are construed more liberally than private agreements.[2] Accordingly, where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred.[3] In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements.[4]

To the fullest extent possible, the language of a treaty is to be interpreted so as to avoid inconsistency.[5] Obscurities and uncertainties of obligatory clauses are to be interpreted in favor of the party who obligates himself or herself, however, and the obligation must be restricted to the sense that lessens the obligation, for one who obligates himself or herself does it as little as he or she can, and if the other party is not satisfied, he or she should require a clearer and fuller explanation of the meaning of the clause.[6]

Liberality in the construction of a treaty is not restricted by any necessity of avoiding possible conflict with state legislation.[7] However, it is not an invariable rule of construction that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into with a view to effecting the objects and purposes of the states thereby contracting.[8] Accordingly, the general rule that treaties should be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them does not justify a state court in judicially legislating as against the right of the state and its taxing power, and in adding words to a treaty so as to make it applicable to the estates of citizens of the United States in the United States, where, by its terms, it is only applicable to the estates of aliens or to the estates of citizens of the United States who reside in a foreign country.[9]

Footnotes

1 In re Wyman, 191 Mass. 276, 77 N.E. 379 (1906); Pagano v. Cerri, 93 Ohio St. 345, 112 N.E. 1037 (1916).

2 Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985); Tachiona v. U.S., 386 F.3d 205 (2d Cir. 2004); Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008); Mitsubishi Materials Corp. v. Superior Court, 113 Cal. App. 4th 55, 6 Cal. Rptr. 3d 159 (4th Dist. 2003).

3 U.S. v. Stuart, 489 U.S. 353, 109 S. Ct. 1183, 103 L. Ed. 2d 388 (1989); Board of County Com'rs of Dade County, Fla. v. Aerolineas Peruanasa, S. A., 307 F.2d 802 (5th Cir. 1962); Ramanauskas v. U.S., 526 F.3d 1111 (8th Cir. 2008); In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011); U.S. v. Belfast, 611 F.3d 783 (11th Cir. 2010), cert. denied, 131 S. Ct. 1511, 179 L. Ed. 2d 334 (2011).

4 U.S. v. Belfast, 611 F.3d 783 (11th Cir. 2010), cert. denied, 131 S. Ct. 1511, 179 L. Ed. 2d 334 (2011).

5 Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423 (2d Cir. 2001).

6 Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 315 (1933); Jordan v. K. Tashiro, 278 U.S. 123, 49 S. Ct. 47, 73 L. Ed. 214 (1928); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933).

7 Nielsen v. Johnson, 279 U.S. 47, 49 S. Ct. 223, 73 L. Ed. 607 (1929); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933).
As to an endeavor to sustain state legislation, see § 16.

8 § 29.

9 Moody v. Hagen, 36 N.D. 471, 162 N.W. 704 (1917), aff'd, 245 U.S. 633, 38 S. Ct. 133, 62 L. Ed. 522 (1917).

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§ 22. Practical construction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

A.L.R. Library

Construction and Application of Political Question Doctrine by State Courts, 9 A.L.R.6th 177

Where a provision in a treaty is ambiguous, the court in construing it may appropriately look to the practical construction that has been placed upon it.[1] The practice of a treaty's signatories counts as evidence of the treaty's proper interpretation since the signatories' conduct generally evinces their understanding of the agreement that they signed.[2] The view has been expressed earlier that the construction given to a treaty in practice, especially when such practical construction is of long standing, will be adopted by the courts and that the political department having interpreted the compact, such interpretation is deemed to be binding on the judiciary.[3] While it may seem that the same thought has been repeated,[4] doubt has been cast upon the universal applicability of such rule,[5] inasmuch as it has been said that the question of the construction of treaties is peculiarly judicial in its nature,[6] although the courts, when called upon to act, should be careful to see that the construction placed upon a treaty and consistently adhered to by the executive department of the federal government, charged with the supervision of foreign relations, while not conclusive on the courts, is given much weight.[7] The rule as to contemporary construction never applies where titles or personal rights would be impaired.[8]

CUMULATIVE SUPPLEMENT

Cases:

When federal court is asked to interpret intent of parties to treaty, pursuant to motion to vacate or confirm an arbitration award made in the United States under the Federal Arbitration Act, it should normally apply the presumptions supplied by American law, such as the presumption that parties intend procedural preconditions to arbitration to be resolved primarily by arbitrators. 9 U.S.C.A. § 1 et seq. BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014).

[END OF SUPPLEMENT]

Footnotes

1 Pigeon River Imp., Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 54 S. Ct. 361, 78 L. Ed. 695 (1934); U.S. v. Decker, 600 F.2d 733 (9th Cir. 1979); Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008).

2 U.S. v. Stuart, 489 U.S. 353, 109 S. Ct. 1183, 103 L. Ed. 2d 388 (1989); Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000).

3 Nielsen v. Johnson, 279 U.S. 47, 49 S. Ct. 223, 73 L. Ed. 607 (1929).

4 Pigeon River Imp., Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 54 S. Ct. 361, 78 L. Ed. 695 (1934); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933).

5 Pigeon River Imp., Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 54 S. Ct. 361, 78 L. Ed. 695 (1934).

6 Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

7 El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999); State of Minn. by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981); DuPree v. U.S., 559 F.2d 1151 (9th Cir. 1977).

8 Charlton v. Kelly, 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274 (1913).

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§ 23. Intent

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

The ascertainment of intent is the fundamental rule by which the courts are guided in the interpretation of treaties.[1] Indeed, when interpreting treaties, the courts generally look for a clear statement of the intent of the treaty drafters.[2] When construing a treaty, effect must be given to the intent of both signatories.[3]

The treaty's language provides the best evidence of the intent of the parties.[4] Where the language of the treaty clearly expresses its meaning and intention, no other means of interpretation may be employed.[5] Although the preamble to a treaty is not part thereof, it may be considered in construing the intent of the party.[6] A sensible and reasonable effect must be given unless the wording of the treaty forbids, and the cognate rules of international law and of legislation of the government may be considered.[7] The intention of the parties is to be gathered from the whole instrument as it stood when the ratifications were exchanged.[8]

When interpreting a treaty, the clear import of the treaty language controls unless an application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.[9]

A treaty will not be held to divest a state of land unless the intention to do so is certain beyond reasonable question.[10]

Footnotes

1 MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988); Board of County Com'rs of Dade County, Fla. v. Aerolineas Peruanasa, S. A., 307 F.2d 802 (5th Cir. 1962); U.S. v. Kember, 685 F.2d 451, 9 Fed. R. Evid. Serv. 1583 (D.C. Cir. 1982); Lazarou v. Moraros, 101 N.H. 383, 143 A.2d 669 (1958).

2 Mora v. New York, 524 F.3d 183 (2d Cir. 2008).

3 National Westminster Bank, PLC v. U.S., 512 F.3d 1347 (Fed. Cir. 2008).

4 Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73 (2d Cir. 2005).

5 Maximov v. U.S., 373 U.S. 49, 83 S. Ct. 1054, 10 L. Ed. 2d 184 (1963); U.S. v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000).

6 Lazarou v. Moraros, 101 N.H. 383, 143 A.2d 669 (1958).

7 Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880, 13 A.L.R.2d 319 (1949); Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

8 § 25.

9 U.S. v. Lomeli, 596 F.3d 496 (8th Cir. 2010); National Westminster Bank, PLC v. U.S., 512 F.3d 1347 (Fed. Cir. 2008); Air China Ltd. v. San Mateo County, 174 Cal. App. 4th 14, 93 Cal. Rptr. 3d 893 (1st Dist. 2009), as modified on denial of reh'g, (June 16, 2009) and review denied, (Aug. 26, 2009).

10 Seneca Nation of Indians v. New York, 382 F.3d 245 (2d Cir. 2004).

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74 Am. Jur. 2d Treaties § 24

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III. Construction

§ 24. Rule of uberrima fides

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

Treaties should be so construed as to uphold the sanctity of the public faith.[1] A convention in a treaty that is operative upon both of the signatory powers, and is intended for their mutual protection, should be interpreted in a spirit of uberrima fides.[2]

Footnotes

1 Sullivan v. Kidd, 254 U.S. 433, 41 S. Ct. 158, 65 L. Ed. 344 (1921).

2 Johnson v. Browne, 205 U.S. 309, 27 S. Ct. 539, 51 L. Ed. 816 (1907); Tucker v. Alexandroff, 183 U.S. 424, 22 S. Ct. 195, 46 L. Ed. 264 (1902).

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III. Construction

§ 25. Rule of pari materia

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

The intention of the parties to a treaty is to be gathered from the whole instrument as it stood when the ratifications were exchanged.[1] All parts of the treaty are to receive a reasonable construction with a view to giving a fair operation to the whole,[2] and all provisions relevant to the inquiry are to be considered.[3] The words used are to be given their natural and ordinary signification.[4]

Footnotes

1 Eck v. United Arab Airlines, Inc., 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640, 6 A.L.R.3d 1260 (1964); Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

2 Sullivan v. Kidd, 254 U.S. 433, 41 S. Ct. 158, 65 L. Ed. 344 (1921); Johnson v. Olson, 92 Kan. 819, 142 P. 256 (1914); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933); Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

3 Wyers v. Arnold, 347 Mo. 413, 147 S.W.2d 644, 134 A.L.R. 876 (1941); Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

4 Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

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III. Construction

§ 26. Rule of ejusdem generis

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

The rule of ejusdem generis is at most one of construction to be resorted to as an aid in the construction of a treaty only when words or phrases are of doubtful meaning.[1]

Footnotes

1 Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 315 (1933).

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74 Am. Jur. 2d Treaties § 27

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III. Construction

§ 27. Extraneous documents

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

Since the courts endeavor to give meaning to all parts of a treaty,[1] a map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty.[2] In the interpretation of a treaty, a letter by the secretary of state sending the treaty to the President preparatory to transmission to the Senate may be considered.[3]

Footnotes

1 § 18.

2 U.S. v. State of Tex., 162 U.S. 1, 16 S. Ct. 725, 40 L. Ed. 867 (1896).

3 Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880, 13 A.L.R.2d 319 (1949).

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III. Construction

§ 28. Several languages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

Since a treaty must be construed as a whole, where it is executed in two languages, both versions are originals, and both must be deemed as intended by the contracting powers to be identical in meaning; accordingly, a construction must be sought that will bring the terms of the two languages into harmony with each other.[1] However, in construing a treaty done in counterparts, one in the language of each contracting party, the courts can make little use of the local, technical definitions of words.[2]

Footnotes

1 Kahn Lucas Lancaster, Inc. v. Lark Intern. Ltd., 186 F.3d 210 (2d Cir. 1999); Johnson v. Olson, 92 Kan. 819, 142 P. 256 (1914).

2 In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 157 A.L.R. 87 (1944).

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§ 29. History and purpose

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

Treaties are to be read in the light of the conditions and circumstances existing at the time they were entered into with a view to effecting the object and purposes of the contracting states.[1] Where the literal meaning of a treaty is ambiguous, the court may look to the purposes of the treaty to aid its interpretation.[2] A treaty must be interpreted as a whole in light of its object and purpose, including the preamble.[3] Under international law, a preamble provides valuable context for understanding the terms of a treaty.[4] The general language of a treaty's preamble may not be used to create an ambiguity in specific statutory or treaty text where none exists; the courts should look to materials like the preambles and titles only if the text of the instrument is ambiguous.[5]

When interpreting a treaty, the court looks beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the signatory parties.[6] The reason of the treaty, that is, the motive that led to the making of the treaty, and the object in contemplation at the time, are the most certain clues to lead to the discovery of its true meaning.[7] Hence, the history of a treaty is to be considered,[8] as well as the negotiations and diplomatic correspondence of the parties as aids to its interpretation.[9] Federal and state courts regularly look to the historical context of a treaty to elucidate its meaning, particularly where any terms are ambiguous or where the treaty is silent on a point.[10] However, if a treaty's wording is clear, a resort to the drafting history to ascertain its meaning is not appropriate.[11]

CUMULATIVE SUPPLEMENT

Cases:

When a treaty provision is ambiguous, a court may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017).

[END OF SUPPLEMENT]

Footnotes

1 Choctaw Nation of Indians v. U.S., 318 U.S. 423, 63 S. Ct. 672, 87 L. Ed. 877 (1943); U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933).

2 Ehrlich v. American Airlines, Inc., 360 F.3d 366 (2d Cir. 2004); In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011).

3 Gandara v. Bennett, 528 F.3d 823 (11th Cir. 2008).

4 Mora v. New York, 524 F.3d 183 (2d Cir. 2008).

5 Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007).

6 Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991); Swarna v. Al-Awadi, 622 F.3d 123, 77 Fed. R. Serv. 3d 785 (2d Cir. 2010); Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634 (5th Cir. 1994); Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007); U.S. v. State of Wash., 157 F.3d 630 (9th Cir. 1998); Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008); Mitsubishi Materials Corp. v. Superior Court, 113 Cal. App. 4th 55, 6 Cal. Rptr. 3d 159 (4th Dist. 2003).

7 Santovincenzo v. Egan, 284 U.S. 30, 52 S. Ct. 81, 76 L. Ed. 151 (1931); Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 33 S. Ct. 209, 57 L. Ed. 407 (1913); Eck v. United Arab Airlines, Inc., 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640, 6 A.L.R.3d 1260 (1964).

8 Cook v. U.S., 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933); U.S. v. Li, 206 F.3d 56 (1st Cir. 2000); Kass v. Reno, 83 F.3d 1186 (10th Cir. 1996); Bishop v. Reno, 210 F.3d 1295 (11th Cir. 2000); Eck v. United Arab Airlines, Inc., 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640, 6 A.L.R.3d 1260 (1964).

9 State of Arizona v. State of California, 292 U.S. 341, 54 S. Ct. 735, 78 L. Ed. 1298 (1934); Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 315 (1933); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933).

10 Mitsubishi Materials Corp. v. Superior Court, 113 Cal. App. 4th 55, 6 Cal. Rptr. 3d 159 (4th Dist. 2003).

11 State v. Aydiner, 228 Or. App. 282, 208 P.3d 515 (2009), review denied, 347 Or. 259, 218 P.3d 541 (2009) and cert. denied, 131 S. Ct. 530, 178 L. Ed. 2d 374 (2010).

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§ 30. Meaning of words

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

Forms

Am. Jur. Pleading and Practice Forms, Treaties § 7 (Complaint in Federal Court—Arising under treaty—To quiet title to American Indian tribal lands)

Am. Jur. Pleading and Practice Forms, Treaties § 8 (Complaint in United States Court of Federal Claims—By American Indian—To recover damages for wrongful death—Under rights provided by treaty)

Where a treaty fails to define a word or phrase, the courts interpret the term according to its ordinary and natural meaning rather than a rigid technical or legal definition.[1] The words of a treaty are to be interpreted according to their ordinary meaning as understood in the public law of nations.[2] In ascertaining the meaning of a treaty, the words used are to be given their natural and ordinary signification, and a sensible and reasonable effect must be given unless the words forbid.[3] The words used are to be given their natural and ordinary signification, and if the language of the treaty clearly expresses the meaning and intention of the treaty, no other means of interpretation may be employed.[4] By reason of the fact that they are international in character, the words of a treaty are to be taken as understood in the public law of nations and not in any artificial or special sense impressed by local law unless the restricted sense is clearly intended.[5] However, it is not an unusual judicial problem to have to seek the meaning of a law expressed in words not doubtful by themselves but made so by circumstances or the objects to which they come to be applied.[6] The inquiry in all such cases is as to what was intended in the treaty by the contracting powers.[7] It is a court's responsibility to give the specific words of a treaty a meaning consistent with the shared expectations of the contracting parties.[8]

Treaties, like statutes, should be so construed that no words are treated as being meaningless, redundant, or mere surplusage.[9]

Where a long-continuing judicial construction of the language used in treaties has given it a character that the treaty-making agencies have not seen fit to alter, and such construction is entirely consistent with the plain language of the treaty, a court should not change such construction even though as an original matter, another construction may have much to commend it.[10]

A treaty with Indians must be construed not according to the technical meaning of its words to learned lawyers but in the sense in which they would naturally be understood by the Indians.[11] In interpreting Indian treaties, the general rule is that doubtful expressions are to be resolved in favor of the weak and the defenseless people who are the wards of the nation dependent upon its protection and good faith.[12]

Footnotes

1 In re B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009).

2 Park v. C.I.R., Tax Ct. Rep. (CCH) 58657, Tax Ct. Rep. Dec. (RIA) 136.28, 2011 WL 2416266 (T.C. 2011).

3 Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634 (5th Cir. 1994); Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

4 Hamilton v. Erie R. Co., 219 N.Y. 343, 114 N.E. 399 (1916).

5 Santovincenzo v. Egan, 284 U.S. 30, 52 S. Ct. 81, 76 L. Ed. 151 (1931); Tashiro v. Jordan, 201 Cal. 236, 256 P. 545, 53 A.L.R. 1279 (1927), aff'd, 278 U.S. 123, 49 S. Ct. 47, 73 L. Ed. 214 (1928); Wyers v. Arnold, 347 Mo. 413, 147 S.W.2d 644, 134 A.L.R. 876 (1941).

6 U.S. v. American Sugar Refining Co., 202 U.S. 563, 26 S. Ct. 717, 50 L. Ed. 1149 (1906); In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 157 A.L.R. 87 (1944).

7 § 23.

8 El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999); In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011).

9 Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008).

10 Clark v. Allen, 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953 (1947).

11 Jones v. Meehan, 175 U.S. 1, 20 S. Ct. 1, 44 L. Ed. 49 (1899).

12 McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973).

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III. Construction

§ 31. Meaning of words—Particular terms

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West's Key Number Digest

West's Key Number Digest, Treaties 7, 8

The expression "property of private individuals" has been held to refer to ordinary private property of present ascertainable value and capable of being transferred from man to man.[1] The words "goods and effects" include real, as well as personal property.[2] The expression "commerce and trade" has been held to connote occupations and recognized forms of business enterprise that do not necessarily involve trading in merchandise.[3] Among other words that have been construed are "heirs,"[4] "territories,"[5] "citizens," "native citizens,"[6] and "respective."[7] A "most-favored-nation" clause in a treaty is one in which each party agrees to afford the other all the rights, prerogatives, immunities, and privileges that are or may thereafter be granted to the most favored nation.[8] "Most-favored-nation" clauses may be inapplicable in situations where exceptions are made for valuable consideration.[9]

CUMULATIVE SUPPLEMENT

Cases:

Mutual Legal Assistance Treaty between Germany and the United States did not restrict how United States could act towards criminal fugitive, and therefore disentitling claimant under Civil Asset Forfeiture Reform Act of 2000 (CAFRA) from defending his property claims against government's civil forfeiture action, based on claimant remaining in foreign country in order to avoid prosecution for copyright infringement and money laundering, did not violate Treaty; Treaty adopted framework for making international evidentiary and witness requests between two countries, and was not concerned with criminal extradition. 28 U.S.C.A. § 2466. United States v. Batato, 833 F.3d 413 (4th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Alverez v. U.S., 216 U.S. 167, 30 S. Ct. 361, 54 L. Ed. 432 (1910).

2 In re Stixrud's Estate, 58 Wash. 339, 109 P. 343 (1910).

3 Jordan v. K. Tashiro, 278 U.S. 123, 49 S. Ct. 47, 73 L. Ed. 214 (1928); Frick v. Webb, 263 U.S. 326, 44 S. Ct. 115, 68 L. Ed. 323 (1923).

4 In re Stixrud's Estate, 58 Wash. 339, 109 P. 343 (1910).

5 In re Heikich Terui, 187 Cal. 20, 200 P. 954, 17 A.L.R. 630 (1921).

6 Jordan v. K. Tashiro, 278 U.S. 123, 49 S. Ct. 47, 73 L. Ed. 214 (1928).

7 In re Stixrud's Estate, 58 Wash. 339, 109 P. 343 (1910).

8 Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961); Mentula v. State Land Bd., 244 Or. 229, 417 P.2d 581 (1966).

9 Board of County Com'rs of Dade County, Fla. v. Aerolineas Peruanasa, S. A., 307 F.2d 802 (5th Cir. 1962).

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West's Key Number Digest, Treaties 13, 14

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Validity, Construction, and Application of Mutual Legal Assistance Treaties (MLATs), 79 A.L.R. Fed. 2d 375

Law Reviews and Other Periodicals

Joshua, Camesasca, Jung, Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach, 75 Antitrust L.J. 353 (2008)

While in force, treaties are the supreme law of the land,[1] for, like statutes, they are so declared by the United States Constitution.[2] They are to be executed in the utmost good faith with a view to making effective the purposes of the contracting parties.[3] By express command of the Constitution, it is the duty of the judges of every state to uphold and enforce treaties of the United States,[4] anything in the constitution or laws of any state to the contrary notwithstanding.[5]

Where a treaty provides for a particular judicial remedy, the courts must apply the remedy as a requirement of federal law, and there is no issue of intruding on the constitutional prerogatives of states or other federal branches.[6] Where the treaty does not provide a particular remedy, either expressly or implicitly, it is not for federal or state courts to impose one through

lawmaking of their own.[7] Absent a clear and express statement to the contrary, the procedural rules of the forum state govern the implementation of the treaty in that state.[8] Treaties, like statutes, are subject to constitutional limits, including the separation of powers and the guarantee of due process.[9]

CUMULATIVE SUPPLEMENT

Cases:

A court may enforce individual rights granted by a treaty in the appropriate exercise of habeas jurisdiction. 28 U.S.C.A. § 2241(c)(3). Martinez v. U.S., 793 F.3d 533 (6th Cir. 2015).

The United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution; treaty obligations cannot justify otherwise unconstitutional governmental conduct. United States v. Ryan, 428 F. Supp. 3d 31 (W.D. Wis. 2019).

Pro se plaintiff's claim against government for breaching purported treaty with "Bantu of Nations–United" failed to identify basis for which alleged treaty created private right of action. Wickliffe v. U.S., 102 Fed. Cl. 102 (2011).

[END OF SUPPLEMENT]

Footnotes

1 McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933); Dominguez v. State, 90 Tex. Crim. 92, 234 S.W. 79, 18 A.L.R. 503 (1921); In re Hegney, 138 Wash. App. 511, 158 P.3d 1193 (Div. 2 2007).

2 § 12.

3 Sullivan v. Kidd, 254 U.S. 433, 41 S. Ct. 158, 65 L. Ed. 344 (1921).

4 U.S. v. State of Minnesota, 270 U.S. 181, 46 S. Ct. 298, 70 L. Ed. 539 (1926); Dominguez v. State, 90 Tex. Crim. 92, 234 S.W. 79, 18 A.L.R. 503 (1921).

5 Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907); Butschkowski v. Brecks, 94 Neb. 532, 143 N.W. 923 (1913).

6 Sanchez-Llamas v. Oregon, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006).

7 Sanchez-Llamas v. Oregon, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006); Com. v. Judge, 591 Pa. 126, 916 A.2d 511 (2007).

8 Sanchez-Llamas v. Oregon, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006); Maharaj v. Secretary for Dept. of Corrections, 432 F.3d 1292 (11th Cir. 2005).

9 In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557 (9th Cir. 2011).

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IV. Enforcement

§ 33. As international compact

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West's Key Number Digest

West's Key Number Digest, Treaties 13, 14

A treaty depends for the enforcement of its provisions on the honor and the interest of the governments that are parties to it.[1] If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce its provisions.[2] When a member nation violates a treaty, another member nation cannot obtain redress from the judicial body of the violating nation but may seek enforcement through international negotiations and reclamations.[3] It is obvious that with all this, the judicial courts have nothing to do and can give no redress.[4] At least where the international obligation allegedly violated is either a treaty or a rule of customary international law, as opposed to a peremptory norm or jus cogens, the court has no authority to remedy the alleged violation when the alleged violation takes the form of a law enacted by Congress and signed by the President.[5] Even the existence of a treaty recognized by the political department of the government as still in force cannot be questioned by the courts.[6] However, in the absence of a denunciation of a treaty by the political department, the courts will treat it as still in effect.[7]

The courts will not undertake to inquire and decide whether the person who ratified the treaty in behalf of a foreign nation has the power, by its constitution and laws, to make the engagements into which he or she entered.[8] The courts can no more go behind a treaty that has been executed and ratified by the proper authorities of the government, for the purpose of annulling its effects and operations, than they can behind an act of Congress.[9] However, absent encroachments upon the provisions of the Constitution or of a federal statute enacted subsequently to the effective date of a treaty, the wisdom of the provisions of an administrative agreement authorized by the treaty has been held to be exclusively for the determination of the executive and legislative branches.[10] Until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights that the treaty declares and the government asserts even though the other party to it holds a different view of its meaning.[11]

Whether a State is in a position to perform its treaty obligations is essentially a political question, and the provisions of a treaty that have survived the outbreak of war between the contracting parties may not be held by the courts to have been abrogated upon the cessation of one of them to exist as an international community where the political departments of the government have not so ruled.[12]

Footnotes

1 Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

2 Terlinden v. Ames, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1902).
Generally, as to the observance and breach of treaties, see § 11.

3 Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

4 Charlton v. Kelly, 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274 (1913).
As to powers and duties of courts as to foreign relations and treaties, see Am. Jur. 2d, Constitutional Law §§ 57, 58.

5 Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

6 Terlinden v. Ames, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1902).

7 Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

8 Terlinden v. Ames, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1902).

9 U.S. v. State of Minnesota, 270 U.S. 181, 46 S. Ct. 298, 70 L. Ed. 539 (1926).

10 Wilson v. Girard, 354 U.S. 524, 77 S. Ct. 1409, 1 L. Ed. 2d 1544 (1957).

11 Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 315 (1933).

12 Clark v. Allen, 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953 (1947).

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§ 34. As municipal law

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West's Key Number Digest

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A treaty may contain provisions that confer certain rights on the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law,[1] and which are capable of enforcement as between private parties in the courts of the country.[2] Whether or not treaty violations can provide the basis for particular claims or defenses depends upon the particular treaty and claim involved.[3] A treaty may create standing if it indicates an intention to establish direct, affirmative, and judicially enforceable rights.[4] However, an individual lacks standing to challenge an asserted violation of an international treaty if the sovereign who is a party to the treaty does not protest.[5]

An executed treaty, being the equivalent of an act of Congress,[6] is binding on all courts, state and national. All are bound to recognize it judicially and to respect and enforce such private rights as may be founded upon its stipulations.[7]

The right of the courts to recognize a treaty as the supreme law of the land is not limited to cases in which they are called upon to protect individual rights created by the treaty; they may refuse to authorize any proceeding that would result in violation of the treaty.[8]

Treaties, like some statutes, do not always directly create rights that a private citizen can enforce in court.[9] Indeed, treaties are not presumed to create privately enforceable rights.[10] Whether a treaty creates a right in an individual litigant that can be enforced in domestic proceedings by that litigant is for the court to decide as a matter of treaty interpretation.[11] There is a presumption that treaties do not create privately enforceable rights in the absence of express language to the contrary.[12] For any treaty to be susceptible to judicial enforcement, it must both confer individual rights and be self-executing.[13] The court first looks to the express terms of the treaty and then to the treaty as a whole to determine whether it evidences an intent to be

self-executing and to create a private right of action.[14] Simply stated, to determine whether a treaty creates a cause of action, the court looks to its text.[15]

A self-executing treaty is binding upon the federal and state courts.[16] When the provisions of a treaty are not self-executing, they cannot be enforced in a court in this country unless and until those provisions are implemented by Congress.[17] When a treaty is not self-executing, the treaty does not provide independent, privately enforceable rights.[18] For a nonself-executing treaty, any private claim must be based on a violation of the domestic law implementing the provisions of that treaty.[19] On the other hand, treaties are self-executing in the sense of permitting enforcement by an individual right of action only when a specific intent to create such individual rights can be discerned from the treaty as a whole.[20]

While a United States treaty may contain provisions that confer rights upon the citizens of one of the contracting parties that are capable of enforcement as are any other private rights under the law, generally, this is not so.[21]

The general rule is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts,[22] but there are exceptions with respect to both rights and remedies.[23] An individual right of judicial enforcement derived from an international treaty will not be inferred from the mere fact that a treaty sets out substantive rules of conduct that, if honored, would benefit individuals.[24] A proper respect for diplomatic choices of sovereign nations prompts courts generally to apply a strong presumption against inferring individual rights from international treaties.[25] The courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them.[26]

Observation:

Inferring a cause of action from the Constitution squares with the presumption that justiciable constitutional rights are to be enforced through the federal courts, but by contrast, inferring a treaty-based cause of action embroils the judiciary in matters outside its competence and authority.[27]

Footnotes

1 § 3.

2 U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000); Dominguez v. State, 90 Tex. Crim. 92, 234 S.W. 79, 18 A.L.R. 503 (1921); Bondi v. Mackay, 87 Vt. 271, 89 A. 228 (1913).

3 U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000).

4 Garza v. Lappin, 253 F.3d 918 (7th Cir. 2001); U.S. v. Mann, 829 F.2d 849 (9th Cir. 1987).

5 U.S. v. Jordan, 223 F.3d 676 (7th Cir. 2000); Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990); People v. Salcido, 44 Cal. 4th 93, 79 Cal. Rptr. 3d 54, 186 P.3d 437 (2008), as modified, (Aug. 27, 2008) and cert. denied, 129 S. Ct. 1013, 173 L. Ed. 2d 304 (2009).

6 § 12.

7 Maiorano v. Baltimore & O. R. Co., 213 U.S. 268, 29 S. Ct. 424, 53 L. Ed. 792 (1909); Dominguez v. State, 90 Tex. Crim. 92, 234 S.W. 79, 18 A.L.R. 503 (1921) (holding that a treaty may be set up as a defense to a criminal prosecution instituted in disregard thereof).

8 Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907).

9 Renkel v. U.S., 456 F.3d 640, 65 Fed. R. Serv. 3d 1129, 2006 FED App. 0274P (6th Cir. 2006).

10 Cauthern v. State, 145 S.W.3d 571 (Tenn. Crim. App. 2004).

11 Mora v. New York, 524 F.3d 183 (2d Cir. 2008).

12 Katel Ltd. Liability Co. v. AT & T Corp., 607 F.3d 60 (2d Cir. 2010).

13 Serra v. Lappin, 600 F.3d 1191 (9th Cir. 2010).

14 Gross v. German Foundation Indus. Initiative, 549 F.3d 605 (3d Cir. 2008), cert. denied, 129 S. Ct. 2384, 173 L. Ed. 2d 1294 (2009); Renkel v. U.S., 456 F.3d 640, 65 Fed. R. Serv. 3d 1129, 2006 FED App. 0274P (6th Cir. 2006).

15 McKesson v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008) (also stating that whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies).

16 Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907); In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 157 A.L.R. 87 (1944).

17 Safety Nat. Cas. Corp. v. Certain Underwriters At Lloyd's, London, 587 F.3d 714 (5th Cir. 2009), cert. denied, 131 S. Ct. 65, 178 L. Ed. 2d 22 (2010) (stating that in common parlance, an implemented nonself-executing treaty provision can be "enforced" as the law of the land, and a nonself-executing treaty provision can become "domestic law" when implemented).

18 Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005); Omar v. McHugh, 646 F.3d 13 (D.C. Cir. 2011).

19 Renkel v. U.S., 456 F.3d 640, 65 Fed. R. Serv. 3d 1129, 2006 FED App. 0274P (6th Cir. 2006).

20 State v. Sanchez-Llamas, 338 Or. 267, 108 P.3d 573 (2005), judgment aff'd, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006).

21 Dreyfus v. Von Finck, 534 F.2d 24, 34 A.L.R. Fed. 377 (2d Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

22 Katel Ltd. Liability Co. v. AT & T Corp., 607 F.3d 60 (2d Cir. 2010); Gross v. German Foundation Indus. Initiative, 549 F.3d 605 (3d Cir. 2008), cert. denied, 129 S. Ct. 2384, 173 L. Ed. 2d 1294 (2009); Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir. 2007); Gandara v. Bennett, 528 F.3d 823 (11th Cir. 2008); McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008).

23 Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir. 2007); Gandara v. Bennett, 528 F.3d 823 (11th Cir. 2008).

24 State v. Sanchez-Llamas, 338 Or. 267, 108 P.3d 573 (2005), judgment aff'd, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006).

25 U.S. v. Rommy, 506 F.3d 108, 39 A.L.R. Fed. 2d 703 (2d Cir. 2007).

26 Renkel v. U.S., 456 F.3d 640, 65 Fed. R. Serv. 3d 1129, 2006 FED App. 0274P (6th Cir. 2006).

27 McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008) (a treaty that only sets forth substantive rules of conduct and states that compensation shall be paid for certain wrongs does not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts).

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